

STATE OF MICHIGAN
IN THE SUPREME COURT

DIANE BUKOWSKI and
THE MICHIGAN CITIZEN,

Plaintiff/Appellees,

S. Court No. 129409

Case No. COA # 256893

WCCC # 02-242574-CZ

VS

CITY OF DETROIT ,

Defendant/Appellant.

_____/

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129409 / **PLAINTIFFS-APPELLEES' ANSWER TO DEFENDANT-APPELLANT'S**

APPLICATION FOR LEAVE TO APPEAL

HEARING DATE SEPTEMBER 27, 2005

PROOF OF SERVICE

FILED

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**ANSWER TO DEFENDANT'S REQUEST FOR
LEAVE TO APPEAL OF COURT OF APPEALS OPINION**

Plaintiffs-Appellees answer Defendant City of Detroit's application for leave to appeal the Court of Appeals' May 26, 2005 opinion reversing and remanding the trial court's decision and from the Court of Appeals' July 15, 2005 denial of the City's Motion for Reconsideration. Plaintiffs-Appellees respectfully requests that this Court deny the City of Detroit's application for leave to appeal. The trial court and Court of Appeals' decisions are attached in Exhibit A in Defendant's Application for Leave to Appeal.

STATEMENT OF QUESTION PRESENTED

- I. WHETHER THE COURT OF APPEALS CORRECTLY APPLIED THE PLAIN LANGUAGE OF THE STATUTE WHEN IT RULED THAT THE ADVISORY COMMUNICATIONS EXEMPTION TO THE FREEDOM OF INFORMATION ACT, MCL 15.243(1)(m) ONLY APPLIES TO COMMUNICATIONS OR NOTES WHICH ARE PRELIMINARY TO A FINAL AGENCY DETERMINATION OF POLICY OR ACTION?**

Plaintiffs-Appellees answer YES

Defendant-Appellant answers NO

INDEX OF AUTHORITIES

STATUTES

MCL 15.343(1)(m)	1
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CASES

<u>Kreiner v Fischer</u> , 471 Mich 109, 129 (2000)	1
<u>Sun Valley Food Co. v Ward</u> , 460 Mich 230, 236 (1999)	1
<u>Mudel v Great A & P Tea Co.</u> , 461 Mich 691, 706 (2000)	1
<u>Scarsella v Pollak</u> , 461 Mich 547, 55 (2000)	1
<u>Herald Communication, Inc. v Eastern Michigan University</u> , 265 Mich 185 (2005)	2

**PLAINTIFFS-APPELLEES' BRIEF IN OPPOSITION TO
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

As this Court has often stressed, where legislative language is clear, the judicial duty is to apply the literal language of the statute, regardless of how wise the legislation may seem. Kreiner v Fischer, 471 Mich 109, 129 (2000); Sun Valley Food Co. v Ward, 460 Mich 230, 236 (1999); Mudel v Great A & P Tea Co., 461 Mich 691, 706 (2000); Scarsella v Pollak, 461 Mich 547, 55 (2000).

MCL 15.343(1)(m) states in pertinent part:

A public body may exempt from disclosure as a public record under this act:

* * *

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

In its unpublished decision dated May 26, 2005, the Michigan Court of Appeals held:

Plaintiff argues that, although the Shoulders Report may have been prepared as “preliminary to a final agency determination of policy or action,” the frank communications exemption does not apply because there is no evidence that the Shoulders Report is *currently* preliminary to any agency determination of policy or action. We direct the trial court to address this issue on remand. On remand, the court should take into account that MCL 15.243(1)(m) provides that the frank communication exemption applies only if the communications “*are* preliminary to a final agency determination of policy or action.” (emphasis added), not “*were* preliminary to a final agency determination of policy or action.” Thus, if the Shoulders Report contains communications that are no longer preliminary to an agency determination of policy or action, the frank communications exemption does not apply to these communications.
See Defendant’s Exhibit A.

Defendant is asking this court to engage in the precise judicial activism which it has consistently eschewed by arguing that the legislative intent was to apply this exemption to advisory communications and notes even when they are no longer preliminary to a final agency

determination of policy of action. Because this interpretation of the law would contradict the plain and unambiguous language of the statute, it must be rejected by this honorable Court.

The case Defendant cites for its argument that this Court should reject the plain language of the statute and engage in an activist interpretation of legislative intent is Herald Communication, Inc. v Eastern Michigan University, 265Mich 185 (2005). However, in that case, the argument that the communications cited were no longer preliminary to a final agency determination of policy or action was not presented to the court, and therefore was not considered nor discussed by the court. Hence, that case is not relevant to the issue before the Court today.


It should also be noted that Plaintiffs both made and preserved this argument in their motion for summary disposition, in oral argument before the trial court, and in their brief and argument in front of the Michigan Court of Appeals.

RELIEF REQUESTED

Plaintiffs – Appellees respectfully request that this honorable Court deny Defendant – Appellant’s Application for Leave to Appeal.

Respectfully submitted,

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Dated: September 21, 2005